**UNITED STATES OF AMERICA**
**MERIT SYSTEMS PROTECTION BOARD**

**2010 MSPB 176**

Docket No. NY-0752-09-0137-I-1

**Cyril L. Edwards,**

**Appellant,**

**v.**

**United States Postal Service,**

**Agency.**

August 25, 2010

William E. Burkhart, Jr., Esquire, Rochester, New York, for the appellant.

Jennifer L. Janeiro, Esquire, Windsor, Connecticut, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

## OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of the initial decision that sustained the agency's action reducing his grade and pay. For the reasons set forth below, we GRANT the appellant's petition for review and AFFIRM the initial decision as MODIFIED, mitigating the penalty to a 60-day suspension.

## BACKGROUND

¶2 Based on the results of an investigation, the agency proposed to remove the appellant from his position as EAS-17 Supervisor, Distribution Operations, on a

charge of failure to follow instructions – unauthorized purchases on his government credit card. Initial Appeal File (IAF), Tab 6, Subtabs 4b, 4c. The agency listed three specifications: (1) using his assigned government credit card for personal reasons; (2) unacceptable conduct – receiving night differential to which he was not entitled; and (3) unacceptable conduct – falsification of PS Form 1261 (non-transactor report). *Id.*, Subtab 4c at 1-2. On review, the deciding official found that the "charges" were sustained but that removal was too severe, and he mitigated the penalty to a reduction in grade and pay to the position of Mailhandler, Level 4. *Id.*, Subtab 4a.

¶3 On appeal, the appellant challenged the action and alleged that it was in retaliation for his protected equal employment opportunity (EEO) activity. IAF, Tab 7. During adjudication, the administrative judge notified the parties that she construed the proposal notice as consisting of three separate charges with one specification under each charge, IAF, Tab 14 at 1, and neither party noted any objection.

¶4 Following a hearing, the administrative judge issued an initial decision in which she found charge (1) sustained. Although she found that the appellant's use of his government credit card to buy pizzas for his subordinates was appropriate, she found that his other uses (twelve cash advances, seven gasoline purchases, and two car rentals over a 5-month period, all personal expenses) were not. Initial Decision (ID) at 3-7. The administrative judge further found that charges (2) and (3) were not sustained.[1] *Id.* at 8-9. She found that discipline for the sustained charge promoted the efficiency of the service, and that the appellant

[1] The administrative judge found that charge (2) failed for lack of specificity. ID at 8. As to charge (3), she found that the deciding official mistakenly believed that no showing of intent was required, and that, in fact, he did not believe that the appellant intentionally tried to deceive or defraud the agency when he filled out the forms. *Id.* at 8-9. The administrative judge concluded that, if the deciding official had understood that a charge of falsification does require a showing of intent, he would not have sustained charge (3) and "it would not have been a subject of this appeal." *Id.* at 9.

did not support his claim that the action was taken in retaliation for his prior protected EEO activity. *Id.* at 9. Based on the single sustained charge, the administrative judge found that the reduction in grade and pay was within the limits of reasonableness. *Id.* at 9-11.

¶5 In his petition for review, the appellant disputes the administrative judge's finding that reduction in grade and pay is a reasonable penalty. Petition for Review (PFR) File, Tab 1. The agency has responded in opposition to the appellant's petition for review.[2] *Id.*, Tab 4.

## ANALYSIS

¶6 In analyzing the penalty in this case, the administrative judge, citing the Board's decision in *Vaughn v. U.S. Postal Service*, 109 M.S.P.R. 469, ¶ 16 (2008), *aff'd*, 315 F. App'x 305 (Fed. Cir. 2009), stated that mitigation is appropriate only where the agency failed to weigh the relevant "*Douglas*" factors[3] or where the agency's judgment clearly exceeded the limits of reasonableness. ID at 9. She did not defer to the agency's penalty selection because she found that the deciding official did not consider a specific relevant mitigating factor, that is, the appellant's difficult financial situation. *Id.* at 10. She considered that factor and, independently weighing other factors, determined that the penalty of reduction in grade and pay was nonetheless within the limits of reasonableness. *Id.* at 10-11.

¶7 In *Vaughn*, the agency brought one charge against the appellant, and the Board sustained that charge. *Vaughn*, 109 M.S.P.R. 469, ¶¶ 2, 12. In this case,

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[2] The agency has not filed a petition for review or otherwise challenged the administrative judge's finding that neither charge (2) nor charge (3) is sustained. Therefore, we have not addressed those charges.

[3] These are the factors that the Board has deemed relevant in the agency's consideration of the penalty to be imposed in misconduct cases. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981).

however, the agency brought three charges against the appellant, and the administrative judge sustained only one. In the latter situation, the Board may mitigate the agency's penalty to the maximum reasonable penalty under certain circumstances, *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999), including when the deciding official failed to demonstrate that he considered any specific, relevant mitigating factors before deciding upon a penalty, or when the chosen penalty exceeds the tolerable bounds of reasonableness, *Martin v. Department of Transportation*, 103 M.S.P.R. 153, ¶ 8 (2006), *aff'd*, 224 F. App'x 974 (Fed. Cir. 2007).

¶8 We disagree with the administrative judge's statement that the deciding official did not consider the appellant's financial situation. ID at 10. On the contrary, the deciding official acknowledged in the decision letter that, during the investigation, the appellant stated that the purchases were due to the financial trouble he was experiencing at the time. IAF, Tab 6, Subtab 4a.

¶9 We find, however, that the deciding official failed to properly consider the appellant's claim that he was not on notice that his actions were improper. The deciding official indicated in his decision letter that he did not accept the appellant's claim because, if he "believe[d] that it was appropriate to make those credit card purchases, then [he] would have continued making those purchases after the Fall of 2007," and because "the Government credit cards issued to employees come with warnings that the use of the Government credit card should only be for authorized purchases as related to Postal employment." IAF, Tab 6, Subtab 4a at 1-2. At the hearing, the deciding official testified that "as far as using the personal [sic] credit card, I think it's pretty common sense that you wouldn't use that, you're not to use that for your personal business." Hearing Transcript (HT) at 310; *see also* IAF, Tab 16, Appellant's Exhibit U.

¶10 The appellant acknowledged that he thought personal use of a government credit card was frowned upon, but stated that he was unaware that it was specifically prohibited, and that he thought it was acceptable if he paid the full

balance before the due date. IAF, Tab 6, Subtab 4k at 3-4. He testified that he had limited experience with using a government travel card, and that his only previous use, when he was on travel at a conference, had not been questioned. HT at 462. He stated that it was his understanding that, when he was away from his home facility, he could use the card for incidental purchases and pay the bills when they came due, which is what he did. *Id.* at 463. He explained that, at the time in question, he was detailed from the Logistics and Distribution Center, Rochester, New York (about three minutes from his home), to the Processing and Distribution Center, Rochester, New York (about 25 minutes from his home). *Id.* at 485. He denied ever having received any instruction on the proper use of a government credit card. Instead, he testified, during his supervisory training program, the cards were simply distributed. *Id.* at 486-87.

¶11 The agency did not challenge the appellant's assertions regarding his limited experience with using a government credit card. To the extent that he might have been confused about whether his detail within the local area constituted travel for purposes of government credit card usage, his confusion was shared by other agency employees, including the proposing official, *id.* at 154, and the then-Acting Plant Manager, *id.* at 209. Moreover, while Management Instruction FM-640-2004-1, Government-Issued Individually Billed Travel Charge Cards, provides that such cards may be used for official travel expenses only, and not for personal expenses, it also instructs that, if the card has been used to get a cash advance at an ATM or to pay for non-reimbursable expenses while on travel, those amounts should be paid by the user directly to the bank. IAF, Tab 16, Appellant's Exhibit R at 2. The proposing official testified that the appellant should have known that his use of the credit card was improper because, when he was in supervisory training, an individual in his class was not allowed to "graduate" based on her having allowed her boyfriend to use her government credit card. HT at 124-27. The two types of credit card misuse, however, are considerably different, and the agency has not shown that

knowledge of one would necessarily establish knowledge of the other. After considering the evidence on this matter, we find that it does not support the deciding official's conclusion that the appellant was on notice that his actions were improper.

¶12 We discern no error in the administrative judge's finding that the charge of misuse of a government travel card is sustained. *See Wolak v. Department of the Army*, 53 M.S.P.R. 251, 257 n.8 (1992) (generally, an agency is not required to prove intent to sustain a charge of unauthorized use of government property). However, we find that the appellant's misunderstanding of the rules surrounding the use of government credit cards rendered him unaware that his actions were improper and constitutes a mitigating factor warranting consideration. *See, e.g.*, *Rogers v. Department of Justice*, 60 M.S.P.R. 377, 389-91 (1994).

¶13 The deciding official also indicated that he believed that the reduction in grade and pay penalty he imposed was consistent with that imposed on others for misconduct similar to that engaged in by the appellant. IAF, Tab 16, Appellant's Exhibit U at 2. At the hearing, however, when asked to address the issue of comparator employees, the deciding official mentioned two whose misconduct involved falsification, not misuse of a government credit card. HT at 326-27. He also testified that he considered the notoriety of the situation, *id.* at 328, but, when queried further, he explained that he was referring only to the degree to which the appellant's fellow employees were aware of the misconduct, *id.*, and that he considered the public's awareness only to the extent that "[i]f we allow employees to, you know, violate . . . trust, it would violate the reputation of the postal service," *id.* at 329. The deciding official did consider certain mitigating factors, including the appellant's 8 years of discipline-free service. IAF, Tab 16, Appellant's Exhibit U at 1, and he also acknowledged that the appellant had timely paid the credit card bills and had no outstanding balance, HT at 315-16.

¶14 The most important factor in assessing whether the agency's chosen penalty is within the tolerable bounds of reasonableness is the nature and

seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities. *Gaines v. Department of the Air Force*, 94 M.S.P.R. 527, ¶ 9 (2003). There is no question that the appellant's offense was serious. *Brown v. Department of the Army*, 96 M.S.P.R. 232, ¶ 11 (2004) (there was no question that the appellant's unauthorized use of a government credit card was serious); *Doran v. Department of the Interior*, 11 M.S.P.R. 270, 271, 273 (1982) (the appellant's misconduct, which included misuse of a government credit card for personal gain, was serious). The deciding official indicated that he had lost confidence in the appellant because of his failure to follow the rules. IAF, Tab 16, Appellant's Exhibit U at 1-2. In addition, agencies are entitled to hold supervisors like the appellant to a higher standard than non-supervisors because they occupy positions of trust and responsibility. *Gebhardt v. Department of the Air Force*, 99 M.S.P.R. 49, ¶ 21 (2005), *aff'd*, 180 F. App'x 951 (Fed. Cir. 2006). The deciding official explicitly testified that he deemed the appellant's misconduct unacceptable for a supervisor and that it was inappropriate to retain him in a supervisory position. HT at 334.

¶15 Nevertheless, we find it significant that the agency failed to weigh the relevant mitigating factor that the appellant was not on notice that his use of the government credit card was wrong. For that reason, and others as set forth below, despite the serious nature of the appellant's misconduct, we find that mitigation to a less severe penalty than the substantial demotion that the agency imposed is warranted.

¶16 We first note that the deciding official did not indicate in his final decision that he would have imposed a penalty less severe than a reduction in grade and pay on fewer charges. IAF, Tab 6, Subtab 4a; *see Lachance*, 178 F.3d at 1260; *cf. Gregory v. U.S. Postal Service*, 88 M.S.P.R. 394, ¶¶ 5-6 (2001) (remanding to the agency to select a new penalty where the deciding official did not indicate what lesser penalty he would have imposed in the absence of certain prior discipline). However, when asked at the hearing what his decision would have been if he had

only sustained the charge of misusing the credit card, the deciding official speculated that he would have considered "maybe reducing to the craft or possibly a long term suspension." HT at 341. As to the demotion, the deciding official testified that he assumed and intended that, when demoted, the appellant would be placed in a full-time craft position, but that he later learned that the agency's collective bargaining agreements require a demoted supervisor to start over at the bottom of the craft in a part-time position. HT at 339-40; *see also* HT at 369-70 (testimony of agency Labor Relations Specialist that, according to the Mailhandler contract, an individual who returns to the craft after more than a year must start a new period of seniority as a part-time flexible). In fact, after the appellant was demoted, and after he filed his appeal, the agency notified him that, due to administrative error, he would be retroactively reassigned as a part-time flexible Mailhandler instead of the full-time Mailhandler position to which he was originally demoted. IAF, Tab 16, Appellant's Exhibit L. Thus, the actual demotion turned out to be more severe than the deciding official intended. As to the length of the "long term suspension" that the deciding official testified he also might have imposed had he sustained only the charge of misusing the credit card, he speculated that it "could be thirty days, sixty day[s], I don't know," before he ultimately stated that he "would have conferred with the legal department and labor department as to what would be appropriate." HT at 342.

¶17 We find that the deciding official's apparent misunderstanding as to the actual severity of the demotion, and his testimony regarding the possibility that he might have imposed a long suspension if he had sustained only the charge that we have sustained, constitute strong evidence that the penalty imposed by the agency is excessive and that the agency would have imposed a lesser penalty, if the deciding official had been better informed. Thus, while we consider the sustained misconduct serious, in consideration of the deciding official's misunderstanding regarding the extent of the demotion and weighing the other factors described above, we find that a 60-day suspension is the maximum

reasonable penalty under the particular circumstances of this case.[4] *Cf. Brown*, 96 M.S.P.R. 232, ¶¶ 2, 9, 11, 14-15 (the administrative judge erred in mitigating the removal of a Materials Handler for misuse of a government credit card to a 60-day suspension where the employee misused the card at least 67 times, allowed his account to remain delinquent, was clearly on notice that the government credit card was to be used only for government expenses, and had been previously suspended for 60 days); *Quarters v. Department of Veterans Affairs*, 97 M.S.P.R. 511, ¶¶ 2, 5 (2004) (the Board upheld the agency's action suspending the appellant, a supervisor, for 30 days for unauthorized use of a government credit card where, despite having prior discipline, he used the card on one occasion by mistake, promptly paid the bill and did not profit from his misconduct, and had 17 years of service). In mitigating the demotion despite the fact that the appellant was a supervisor, as we have done, we particularly note that the fact that the Postal Service contracts require extreme demotions such as the one imposed here distinguishes this case from other cases where a one-grade demotion to a nonsupervisory position is possible.

## ORDER

¶18 We ORDER the agency to cancel the reduction in grade and pay action and substitute a 60-day suspension, and to restore the appellant effective January 30, 2009. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶19 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or

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[4] Imposing a 60-day suspension does not run afoul of our reviewing court's warning that the Board may not, in imposing the maximum reasonable penalty under similar circumstances, select a penalty that is more severe than the one the agency has indicated it would have imposed in the first instance based on the sustained charges. *See Lachance*, 178 F.3d at 1259.

Postal Service Regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶20 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶21 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶22 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

## NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees

WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

## NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

### Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

### Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to

file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the

court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.